

1 MR. COHEN: Correct.

2 JUDGE SIPPEL: Okay.

3 MR. COHEN: Mr. Nickels is not
4 going to testify. We've never seen the
5 underlying data. It was never produced to us.
6 Mr. Herring said in his declaration and Mr.
7 Rose said it earlier today on the in limine
8 motion that they have always kept this data.
9 Well, they may have always kept it, but they
10 haven't produced it and not a single document
11 underlying this data has ever been produced.

12 So Mr. Herring is not the person
13 who created this table. Mr. Nickels is not
14 coming here to testify. He's an employee. If
15 Mr. Nickels wants to come here and tell us
16 what he did and I can cross examine him and
17 ask him where the 500 individual responses are
18 because we know from Mr. Kersey's testimony
19 that they get physical emails and then they
20 take the physical emails and they somehow
21 compile this.

22 So there's no way to figure out if

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1 this is accurate. Mr. Herring is not the
2 person who created this document. He is not
3 the person who did the tabulation. He has
4 testified in his declaration that he did not
5 see the underlying data but that the results
6 were reported to him. It's completely
7 unreliable hearsay and frankly I think Wealth
8 has got some explaining to do about where the
9 underlying documents are.

10 JUDGE SIPPEL: Well, let's hear
11 from Wealth. Who wants to take this one?

12 MR. ROSE: Your Honor, this is Mr.
13 Rose. The tabulation that was prepared in
14 2007 as his email indicates December 2007 by
15 Mr. Nickels, an employee of WealthTV, it's
16 something they do in the ordinary course of
17 their business. They tabulate these things
18 and I'm told there's a simple reason he didn't
19 produce the underlying data is he doesn't have
20 it anymore. So it just has the tabulation.

21 JUDGE SIPPEL: What happened to
22 it?

1 MR. ROSE: I -- He'll be available
2 to say that on cross examination. I could ask
3 him right now, but I don't know.

4 JUDGE SIPPEL: '06 to '07 data.
5 Well, it's objected to for a failure to
6 accurately document, to show source, and
7 that's certainly a good objection. It goes
8 right to the heart of reliability.

9 MR. ROSE: Your Honor, the
10 business keeps records. It doesn't
11 necessarily keep the underlying data it
12 created the records from. It prepares these
13 tabulations. It prepared them before the
14 proceeding started as part of the ordinary
15 course of business. It didn't save the source
16 data. Maybe it would have been a better idea
17 if it were anticipating litigation. But
18 apparently they just didn't have it to
19 produce.

20 MR. COHEN: Your Honor, by
21 December of '07, they had sued us.

22 JUDGE SIPPEL: When?

1 MR. COHEN: Within a week of doing
2 this tabulation being completed and in fact it
3 they threatened us with an FCC pre-filing in
4 May of '07. So I reject that there was no
5 expectation of litigation and it's not kept in
6 the ordinary course. If it were kept in the
7 ordinary course, we would be able to see the
8 data.

9 Mr. Kersey did a tabulation for a
10 different period of time, a couple of hundred
11 respondents. He produced all of the emails.
12 So we have an opportunity with Mr. Kersey to
13 say "You say it's 70 percent men, 30 percent
14 women. Let's look at the individual responses
15 you got and see if it's tabulated correctly"
16 and what we're going to see is it's not
17 reliable and there are issues and we've had an
18 entire day of testimony.

19 Now we have another document
20 without the witness who created it, without
21 the underlying documents and it's an effort
22 again to bootstrap Mr. Kersey's opinion. So

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1 we can cross examine Mr. Kersey, but we can't
2 cross examine this document. Even if we had
3 Mr. Nickels, we can't cross examine him

4 This is compiled from individual
5 email responses. Somebody submits a comment
6 to the WealthTV website. They make the
7 decision. It's not a survey. They make the
8 decision to report and then they choose male
9 or female and in this period of time and this
10 is critical for one of these two forms, there
11 was no male or female. So somebody read
12 somebody's name, and you're going to hear this
13 from Mr. Kersey. Somebody read a name Les.
14 Is Les Leslie? Is that a man or a woman?
15 Somebody made a judgment in these documents.

16 So I can't cross examine Mr.
17 Nickels because he's not here and if he were
18 here, I don't have any way of authenticating
19 the information and this is the only such
20 document that Wealth has now produced
21 belatedly. They didn't produce it during
22 discovery

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1 So you can't say it's in the
2 ordinary course. If there were a periodic
3 report by which Wealth had generated
4 information about its respondents to the
5 website and I could look at the monthly
6 reports and say these are generated in the
7 ordinary course, this -- We can't say that
8 about this document. It's a one-off and Mr.
9 Kersey will say he's never seen another one.
10 So this has massive reliability problems as
11 well as hearsay problems.

12 JUDGE SIPPEL: Now does this type
13 of document -- Is this one of its kind? I
14 mean, this is it. There is no one for some
15 period of '07-'08 or this is it?

16 MS. WALLMAN: This is the only one
17 that the company has. Mr. Cohen was referring
18 to a similar document that we've created in
19 the course of some work that Mr. Kersey did.
20 That work was done in a particular context
21 trying to ascertain whether many or most of
22 the viewers of WealthTV were of drinking age

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1 so that they could sell advertising to liquor
2 companies.

3 The company during this period was
4 keeping tabulations. They did that from time
5 to time. The underlying documents that Mr.
6 Kersey relied upon were of course called for
7 in expert discovery and they were produced.
8 This is a business record. The underlying
9 versions of those records no longer exist and
10 Mr. Herring can be cross examined as to
11 methodology and as to reliability based on how
12 convincing he is about methodology.

13 The work was done both in the
14 company because they couldn't wait to find out
15 what the results were and was also done
16 independently by Mr. Kersey because they
17 thought it was important to have an outside
18 third party look at the results so that they
19 would be more credible, more reasonable, from
20 the perspective of the potential advertisers.

21 JUDGE SIPPEL: Who is Mr. Kersey?

22 MS. WALLMAN: Mr. Kersey is an

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1 industry analyst. He runs a research firm in
2 San Diego. He was identified as one of our
3 expert witnesses and he's going to be
4 presenting testimony probably the second day
5 of our case in chief.

6 MR. COHEN: Your Honor, if I may.
7 When I deposed Mr. Kersey and this document
8 showed up in the course of Mr. Kersey's
9 deposition, he couldn't identify it. He
10 doesn't know who created it and here's one
11 thing we know. Mr. Herring didn't do this
12 tabulation. So we don't -- Even if we could
13 excuse the failure to have the underlying
14 information which I don't think is excusable,
15 I don't have in front of me the witness who
16 actually did this tabulation. It was just
17 reported to Mr. Herring. He can't be the --

18 You know they've made a decision
19 that they're going to put all the eggs in Mr.
20 Herring's basket. They could have called --
21 They had two declarants below, Mr. Herring's
22 father who is the co-founder. He's here.

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1 He's not testifying. They have affiliate
2 relations people who went to visit with the
3 various Plaintiffs. They could testify.
4 They're not testifying. Mr. Nickels did or
5 didn't do whatever he did. They could have
6 called him. They didn't call him.

7 It's inappropriate for Mr. Herring
8 to come in with a document which is completely
9 unreliable on its face which he didn't create
10 and try to put it into evidence as
11 corroborative of what his expert did.

12 MS. WALLMAN: Well, again, Your
13 Honor, he can be examined on all those matters
14 and I take some issue with Mr. Cohen
15 characterizing our strategy and how we're
16 presenting witnesses and the representation
17 that this is the document that was identical
18 to the one that was presented in the Kersey
19 exhibits.

20 MR. COHEN: It's identical to the
21 documents produced in the afternoon of his
22 deposition.

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1 MS. WALLMAN: I don't have that
2 document here. Maybe you remember it
3 specifically enough to know that all the
4 headings and format are the same. I don't.

5 MR. COHEN: Exactly.

6 MS. WALLMAN: I don't know it's
7 the same and I don't want your criticism of
8 this document to be transferred to whatever
9 Mr. Kersey may testify about and rely upon.

10 JUDGE SIPPEL: Well, what do we do
11 about this? I mean, if Mr. Kersey came in,
12 what would he say about this document?

13 MS. WALLMAN: Well, first of all,
14 Your Honor, let me testify about this
15 document. There is a document, an exhibit, in
16 his deposition. I assume it would be used in
17 his cross examination here and on that basis
18 I can't tell you exactly what Mr. Kersey would
19 say about this document.

20 MR. COHEN: I know exactly what
21 he'll say, Your Honor, because I asked him in
22 his deposition. So let me try to be clear.

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1 There was a reference in an email that was
2 produced by Mr. Kersey so a document that
3 sounded like this. We made a request in the
4 course of the deposition that that document be
5 produced. Ms. Wallman, Mr. Herring, obtained
6 that document in the afternoon of the
7 deposition. This document was marked at Mr.
8 Kersey's deposition.

9 JUDGE SIPPEL: This document
10 being?

11 MR. COHEN: Exhibit 30, Trial
12 Exhibit.

13 JUDGE SIPPEL: Tab 30.

14 MR. COHEN: Well, Exhibit 30 was
15 marked in Mr. Kersey's deposition and he said,
16 "Apparently they were doing their own
17 tabulation" and said he had never seen the
18 document before and couldn't say anything
19 about it. So Mr. Kersey is not going to help
20 us with the reliability of this document. So
21 we just -- We do not have a witness who was
22 involved in its preparation.

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1 MR. MILLS: Your Honor. This is
2 David Mills.

3 JUDGE SIPPEL: Yes sir, Mr. Mills.

4 MR. MILLS: Mr. Kersey has already
5 submitted an expert report on this topic.
6 This is cumulative. It's unreliable. If Mr.
7 Kersey's testimony holds up, they have the
8 information they need. If it doesn't, that's
9 all right to cross examine him. That's fair.

10 This is not cross examinable. It
11 just is not fair to the Defendants. It's an
12 attempt to bolster what Mr. Kersey did and
13 that is exactly what Mr. Kersey was called to
14 do. So he should either stand or fall on his
15 own merits and this can't even be
16 authenticated. So it seems to me entirely
17 unfair especially without the underlying data
18 to admit it.

19 JUDGE SIPPEL: Anything to add to
20 this, Ms. Wallman? It looks to me like
21 there's nobody that's going to sponsor this
22 document, that prepared it or it just

1 appeared.

2 MS. WALLMAN: This was prepared in
3 the normal course of business under Mr.
4 Herring's supervision.

5 JUDGE SIPPEL: By who?

6 MS. WALLMAN: By persons under his
7 supervision including John Nickels. This is
8 not exactly rocket science, Your Honor. The
9 tabulations they performed, they add them and
10 they apply percentages to them and present a
11 spreadsheet.

12 JUDGE SIPPEL: Well, I had a
13 similar situation to this earlier. There's no
14 way that I can -- I mean I'm not going to do
15 or take the time to have someone do an audit
16 of this. There's nothing on the face of this
17 document which shows a source. I have no way
18 of assessing any reliability of this.

19 You say that you think you can get
20 this into evidence through Mr. Nickels. Is he
21 testifying?

22 MS. WALLMAN: No. Mr. Nickels is

1 not testifying.

2 JUDGE SIPPEL: Well, who are you
3 going to get it in through?

4 MS. WALLMAN: We intended for
5 Charles Herring to be the sponsoring witness.

6 JUDGE SIPPEL: And he didn't
7 prepare it. It was prepared you say under his
8 supervision.

9 MS. WALLMAN: Right.

10 JUDGE SIPPEL: Or under this
11 supervision. I'm not ever sure if you're able
12 to say that much. Was it really under his
13 supervision or he knew about the document?

14 MS. WALLMAN: Well, again that
15 could be verified by cross examining him about
16 exactly what its origins were. But that is my
17 understanding that as the president of the
18 company he's responsible for being able to say
19 who is the company is speaking to for its
20 programming and this was prepared under his
21 supervision.

22 JUDGE SIPPEL: All right. I'm

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1 going to reserve on it. I'm very, very leery
2 about this one, but you're making a proffer
3 that your client's going to go to offer this
4 in while he's on the stand and is going to be
5 subject to voir dire. We'll see what happens.

6 (Whereupon, the document referred
7 to was marked as WealthTV Exhibit
8 No. 30 for identification.)

9 Okay.

10 MR. COHEN: Your Honor, you will
11 be pleased to hear that 31, 32 and 33 if we
12 are completely the first binder we have no
13 objection. So if Mr. Rose would like to move
14 their admission I think we are done.

15 JUDGE SIPPEL: Okay. Do we have
16 to take this up with or without lunch? I mean
17 if it's with lunch, it goes. If it's without
18 lunch, then are we going to have a problem
19 with it? That's okay. I'm just kidding.

20 (Laughter.)

21 Okay. Thirty-one, 32 and 33 are
22 identified and are received into evidence as

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1 WealthTV's 31, 32 and 33.

2 (Whereupon, the above-referred to
3 documents were marked for
4 identification as WealthTV
5 Exhibits Nos. 31-33, and received
6 in evidence.)

7 It's 1:10 p.m. back there. Am I
8 reading that clock right?

9 MR. COHEN: Yes, Your Honor.

10 JUDGE SIPPEL: There's a glare.
11 Let's say we come back 2:20 p.m.

12 MR. ROSE: Thank you, Your Honor.

13 JUDGE SIPPEL: Is that enough
14 time?

15 MR. COHEN: Yes.

16 JUDGE SIPPEL: All right. As
17 close to 2:20 p.m. as we can. Let's do it
18 that way and everything is -- You can leave
19 your things in the courtroom whatever you
20 want. The courtroom will be closed. You know
21 how to handle it. We're in recess until 2:20
22 p.m. Thank you. Off the record.

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1 (Whereupon, at 1:10 p.m., the
2 above-entitled matter recessed to reconvene at
3 2:20 p.m. the same day.)

4 JUDGE SIPPEL: All right. This is
5 the afternoon session.

6 We finished with Tab 33, Volume 1.
7 We can now move to Volume 2. Okay. Volume 32
8 at Tab 34.

9 Okay. Who would like to start?
10 Mr. Rose, you have been doing a lot of the
11 work. Are you --

12 MR. ROSE: Well, I can represent
13 to you what it is. It is -- I would like to
14 --

15 JUDGE SIPPEL: You have to move it
16 into evidence.

17 MR. ROSE: 34 I believe is
18 unobjected to, so I would like to move that
19 one into evidence.

20 JUDGE SIPPEL: No objection?

21 MR. COHEN: None, Your Honor.

22 JUDGE SIPPEL: What is it? Well,

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1 what does it -- it says American Driver
2 Automotive Luxury Lifestyle?

3 MR. ROSE: It is an ad that
4 WealthTV put on.

5 JUDGE SIPPEL: Thank you. No
6 objection. It is marked as 34 and received as
7 WTV Exhibit 34.

8 (Whereupon, the above-referred to
9 document was marked as WTV Exhibit
10 No. 34 for identification, and was
11 received in evidence.)

12 35?

13 MR. ROSE: 35 is also an ad. It
14 is also unobjected to.

15 JUDGE SIPPEL: 35 is -- as
16 identified as an ad, says American Driver. So
17 identified, and it is received as WTV Exhibit
18 35.

19 (Whereupon, the above-referred to
20 document was marked as WTV Exhibit
21 No. 35 for identification, and was
22 received in evidence.)

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1 36?

2 MR. ROSE: Once again, it is a
3 document Wealth generated that I believe is
4 not objected to. We would like to move it in
5 as well.

6 JUDGE SIPPEL: Any objection?
7 None?

8 MR. COHEN: None. No, Your Honor.

9 JUDGE SIPPEL: It is identified
10 and received as WTV 36.

11 (Whereupon, the above-referred to
12 document was marked as WTV Exhibit
13 No. 36 for identification, and was
14 received in evidence.)

15 Do we have a series like that, or
16 is this going to come to a --

17 MR. ROSE: I believe 37 is the
18 last in this series.

19 JUDGE SIPPEL: All right. We will
20 identify it and receive it. It is an ad. It
21 is not an ad. This is from Mr. Herring dated
22 September 30th. It is an e-mail, subject

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1 WealthTV. Okay. What is this? Can you
2 represent what this is?

3 MR. ROSE: That is an e-mail from
4 Mr. Herring to Cablevision about their reasons
5 for not accepting his -- not carrying his
6 network.

7 JUDGE SIPPEL: Not carrying his
8 network? Wait just a second. Is this -- can
9 we --

10 MR. ROSE: Cablevision is the
11 carrier. They didn't want to carry his
12 network. He put this in for purposes of I
13 believe showing the damages that this
14 proceeding -- that the denial of carriage has
15 caused him.

16 JUDGE SIPPEL: Well, it is
17 addressed to Tom -- who is Tom Montemagno?

18 MR. ROSE: I believe he is an
19 employee of Cablevision.

20 JUDGE SIPPEL: Cablevision?

21 MR. COHEN: He is the Vice
22 President for Programming at Cablevision.

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1 JUDGE SIPPEL: Thank you. Is
2 there an objection to this document?

3 MR. COHEN: There is no objection,
4 Your Honor.

5 MR. SOLOMON: I would like to
6 mention one thing just about terminology as we
7 go forward.

8 JUDGE SIPPEL: Mr. Solomon?

9 MR. SOLOMON: Mr. Rose a few times
10 has repeated to -- referred to Comcast and the
11 other cable operators as carriers, and I just
12 wanted to be clear that the cable operators
13 are not carriers or common carriers as are
14 commonly -- telephone companies are commonly
15 referred to.

16 JUDGE SIPPEL: Yes, let's be
17 careful with the terminology.

18 MR. ROSE: I am afraid I am not a
19 subject matter expert, and please correct me
20 if I use the wrong term.

21 JUDGE SIPPEL: What can we call
22 it, then? A --

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1 MR. COHEN: Cable operator.

2 JUDGE SIPPEL: There you go.
3 Couldn't be easier. Exhibit 37 is marked and
4 received as WTV Exhibit 37.

5 (Whereupon, the above-referred to
6 document was marked as WTV Exhibit
7 No. 37 for identification, and was
8 received in evidence.)

9 If I have that right, WTV 38 is
10 different. I am going to talk about 38.

11 MR. ROSE: 38 I believe we are
12 starting the objections. This one is an e-
13 mail exchange between Mr. Herring and a --
14 this is an outfit that tracks industry trends.
15 They do viewer ratings or something like
16 Nielsen. Rentrak is the name of the company,
17 and this is an exchange about -- I believe it
18 includes some data that Rentrak, you know, had
19 on WealthTV.

20 JUDGE SIPPEL: And what is the
21 purpose of this?

22 MR. ROSE: I think it is, in fact,

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1 for the data that is in here. This is
2 something WealthTV was getting information on
3 on its, you know, market house performing, who
4 is watching it according to Rentrak's data.

5 JUDGE SIPPEL: Who is Carol
6 Hinnart?

7 MR. ROSE: My understanding is she
8 is a Rentrak official or employee of some
9 kind.

10 JUDGE SIPPEL: A what? I'm sorry.

11 MR. ROSE: She works for Rentrak.
12 Rentrak is the data compilation company that
13 is -- that Mr. Herring is exchanging e-mails
14 with in this series.

15 JUDGE SIPPEL: Okay.

16 MR. COHEN: We have an objection,
17 Your Honor.

18 JUDGE SIPPEL: You do, or you
19 don't?

20 MR. COHEN: We do.

21 JUDGE SIPPEL: Yes?

22 MR. COHEN: Two objections. One

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1 is this is presently hearsay with respect to
2 Ms. Hinnart who is making representations. We
3 can't cross examine her. She is not here.
4 The first e-mail on the second page of this
5 exhibit refers to two competitive reports that
6 he ran. Mr. Herring talks about Rentrak in
7 his testimony. Wealth has never produced this
8 Rentrak report or any other Rentrak report in
9 the course of this proceeding.

10 So, you know, it is hearsay.
11 There is a reliability issue, and there is a
12 prejudice issue as well, because -- a best
13 evidence issue because we don't have the
14 underlying documents. And there are no
15 Rentrak documents that I have seen.

16 JUDGE SIPPEL: What does it
17 purport to represent?

18 MR. ROSE: It talks about reports
19 that Rentrak does. If you look at the
20 penultimate paragraph on this first page of it
21 it says -- it is some about their reports and
22 the numbers in the reports, ranked seventh

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1 highest on orders, top 20 percent of
2 performing networks. It is basically based on
3 data Rentrak tracks.

4 We take the position that it is in
5 the nature of a market report under the
6 hearsay exception for market reports and
7 commercial publications.

8 I am hearing from Mr. Herring that
9 the report was, in fact, an exhibit to one of
10 the complaints below and that it has been
11 produced. But I can't verify that.

12 JUDGE SIPPEL: But for what
13 purpose? I mean, this talks about -- it says,
14 "I am confused by the statement." It sounds
15 like that it is -- what is being communicated
16 to Mr. Herring isn't even being understood.
17 Of what probative value is this?

18 MS. WALLMAN: Your Honor, network
19 channels such as WealthTV always struggle to
20 figure out how to communicate to potential
21 distributors how popular they are. If you
22 have limited distribution, you are not Nielsen

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